

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Streamlining Deployment of Small Cell)	
Infrastructure by Improving Wireless Facilities)	
Siting Policies)	WT Docket No. 16-421
)	
Mobilitie, LLC Petition for Declaratory Ruling)	

REPLY COMMENTS OF MOBILITIE, LLC

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I. SUMMARY

Mobilitie, LLC respectfully submits these reply comments on the Public Notice in this proceeding.¹ The record clearly supports comprehensive Commission action to dismantle the regulatory barriers impeding the deployment of needed new wireless infrastructure. The Commission should issue a declaratory ruling as soon as possible. With each passing month these barriers put infrastructure investment further behind the growth curve the country needs to lead in broadband deployment, robbing the public and our economy of the increase in jobs and economic growth that investment delivers. Smaller, slower buildouts – and in many places no broadband deployment at all – directly penalize all economic and cultural demographics: established businesses, small startups, residents, and the marginalized all suffer.²

¹ *Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, Mobilitie LLC Petition for Declaratory Ruling*, Public Notice, WT Docket No. 16-421, 31 FCC Rcd 13360 (WTB 2016) (“Public Notice”).

² Commenters confirm the linkage between broadband access and economic opportunity. *E.g.*, U.S. Black Chambers Comments at 1 (“Wireless technology is an essential tool for Black businesses. No longer considered a luxury, wireless broadband has become a lifeline.... Better access to wireless networks and more seamless connectivity for all Americans has become a key part of economic opportunity in the modern world.”); Latino Coalition Comments at 1.

The record supplies compelling factual and legal grounds for the Commission to remove the obstacles impeding the deployment of advanced wireless broadband networks. Mobilitie's November 15, 2016 Petition for Declaratory Ruling ("Petition") sought Commission action against one obstacle: the excessive and discriminatory fees localities are imposing on wireless infrastructure along rights of way ("ROWs"). All wireless providers and associations filing comments support Mobilitie's Petition, documenting numerous examples of exorbitant and discriminatory fees that they or their members have confronted. The data illustrate that many localities are leveraging the growing demand for ROW access and their monopoly control over that access to extract monopoly rents. Commenters also support Mobilitie's showing as to why Section 253 of the Communications Act of 1934, as amended ("Act"), supplies legal authority for the Commission to grant the Petition. And they endorse Mobilitie's three specific requests for the Commission to interpret Section 253 to ensure that ROW fees meet the Act's requirement that fees are "fair and reasonable," are "nondiscriminatory and competitively neutral," and are "publicly disclosed" so that they are transparent to all.

In contrast, parties opposing the Petition fail to contravene this substantial record. Many localities are good stewards of their citizens, recognize the economic and other benefits of new infrastructure, and exercise that responsibility appropriately by charging reasonable fees. But that does not change the fact that many others impose fees that are excessive or discriminatory, or both. Others make the incorrect claim that the Petition asks the Commission to set rates for ROW fees. To the contrary, it asks the Commission to declare that fees should be based on localities' costs so as to make them whole, not to specify fees. Some localities assert they are simply setting fees at "market," but there is no free market for ROW access. The record information as to fees confirms that localities exercise monopoly control over ROWs and setting

fees. Others assert that the Commission has no authority at all to address their control over ROW access, but that assertion is belied by Congress' decision in Section 253 to limit localities' discretion to impose requirements or restrictions on services.

Given the strong factual and legal record supporting a declaratory ruling, the Commission can – and should – act quickly. The industry has been working with cities for years, and while some cities are on the vanguard of fast deployment, far too many leverage the growing demand for new facilities to extract high fees. Since filing its Petition nearly five months ago, Mobilitie has strived to work with localities to obtain reasonable fees and secure the many required licenses and permits, but still faces the same obstacles that its Petition and all industry commenters document. Localities continue to require both up-front application and permit fees, as well as recurring, annual “rental” fees – even though they only incur one-time costs to review and process applications and to supervise installation of facilities in ROWs. Worse, some localities are sharply hiking fees to thousands of dollars to capitalize on the demand for additional infrastructure. For a deployment that requires a vast number of small cell facilities across a metropolitan area, these fees quickly mount up to hundreds of thousands of dollars, often making deployment economically infeasible. They far exceed any costs the locality incurs by orders of magnitude, while taking capital that would otherwise go to investment in new infrastructure. Yet as the race to 5G intensifies, the need for that investment to ensure the speed and optimal performance of wireless networks intensifies.

The Commission should thus promptly issue a declaratory ruling granting the Petition. That action will curb the excessive fees that are deterring investment in expanding the nation's wireless infrastructure and blocking creation of the many jobs that investment will generate. Moreover, it will speed provision of advanced services to the public, which increasingly depends

on those services. Accordingly, the Commission should interpret Section 253(c) of the Act as follows:

- “Fair and reasonable compensation” means charges for ROW application and access fees that enable a locality to recoup the costs reasonably related to reviewing and issuing permits and managing ROWs. Additional charges or those not related to actual use of ROWs are unlawful.
- “Competitively neutral and nondiscriminatory” means charges imposed on a provider for access to ROWs that do not exceed the charges imposed on other providers for similar access. Higher charges are discriminatory and therefore unlawful.
- “Publicly disclosed” means that localities must disclose to a provider seeking access to ROWs the charges that they previously assessed on others for access.

II. LOCALITIES NATIONWIDE ARE IMPOSING EXCESSIVE AND DISCRIMINATORY FEES THAT DEPRIVE CITIZENS AND THE ECONOMY OF THE BENEFITS OF BROADBAND DEPLOYMENT.

The Public Notice correctly states that “[t]he successful deployment of wireless networks depends in large part on how quickly providers can obtain the necessary regulatory approvals.”³ But the record establishes that localities are *not* lowering barriers to reflect far less intrusive small cell technologies – to the contrary, many are raising those barriers in the form of higher fees, new requirements, and greater restrictions. And some are hiking fees to even more exorbitant levels. Every organization representing wireless infrastructure providers and carriers, and every individual wireless carrier and provider, agrees with Mobilitie that fees are excessive, that such fees violate Section 253 of the Act, and that the Commission should interpret Section 253 to clarify what constitutes “fair and reasonable compensation” that is “nondiscriminatory and competitively neutral.”

These commenters also explain why excessive and discriminatory fees disadvantage wireless providers and hurt consumers and the economy. As Sprint observes:

³ Public Notice at 5.

[A]ntiquated regulatory and bureaucratic hurdles are slowing the pace of this deployment and diverting millions of dollars away from critical infrastructure investment. Lack of access to right of way structures, excessive fees, and untenable processes and delays from local governments for permitting and installing small cells have become a major barrier to investment in the mobile economy.⁴

AT&T explains that localities imposing high fees drive investment elsewhere, hurting their own citizens:

Service providers are subjected to wildly varying, arbitrary, and excessive one-time and annual fees to access ROWs and poles in the ROW, which distort their decisions about where to deploy facilities and offer advanced services. These distortions encourage service providers to deploy services for reasons other than competition and thus, impede market entry, ultimately harming consumers in both the communities charging the excessive fees and in “downstream” communities with lesser capacity demands. Excessive fees also siphon resources away from broadband deployment, often causing a service provider to abandon a small cell project, diminish the size of the project, or bypass another community.⁵

Broadband deployment generates jobs, promotes economic growth, and delivers social benefits, but only if barriers that are impeding it are removed. As the Latino Coalition observes:

The next level of broadband innovation, and particularly the introduction of 5G wireless networks, will provide growing Latino communities across the U.S. with a whole new level of economic and social uses. Reports estimate this new platform could create as many as three million new jobs nationally and \$500 billion annually to U.S. GDP. We will also see unparalleled connectivity with near instantaneous speeds and increased capacity for data. In real-world terms, these benefits cannot be overstated, especially to those who fall on the wrong side of the digital divide and depend on wireless exclusively to connect to the internet. ... To fully realize these benefits and more, 5G networks must be built out. To

⁴ Sprint Comments at i.

⁵ AT&T Comments at 19.

ensure that happens in a timely manner, it's imperative that there are sound infrastructure policies at the federal, state, and local levels. This entails streamlining permitting processes, establishing clear timelines for review and action, and setting reasonable fees.⁶

The record contains ample evidence of the high fees that localities demand.⁷ For example, Sprint supplies a table of numerous ROW fees that exceed \$1,000, as well as specific jurisdictions imposing excessive or discriminatory fees.⁸ It also documents examples of “franchise” or “gross revenues” fees, explaining that these fees “are inherently unreasonable as they are unrelated to the costs of maintaining the right of way.”⁹ Moreover, the data from Sprint and other providers show that fees vary widely across jurisdictions, including those in the same state, underscoring that fees are not based on costs but on what localities think they can collect as “tolls” for ROW access.¹⁰ As Verizon notes, carriers often have no choice but to pay these excessive fees if they want to be able to deploy needed infrastructure to meet network capacity needs.¹¹

Mobilitie’s experience confirms the data on excessive fees that other providers have put in the record. It has negotiated or is in the process of negotiating many agreements to install facilities in ROWs. Many cities have not yet proposed fee structures, as they focus on design, process or other elements first. Some jurisdictions ask for no or minimal fees (such as \$100), but

⁶ Latino Coalition Comments at 1.

⁷ CTIA Comments at 14; AT&T Comments at 21; Sprint Comments at 25-26; CCA Comments at 16.

⁸ Sprint Comments at 24-25.

⁹ *Id.* at 26-27.

¹⁰ Verizon Comments at Appendix; WIA Comments at 19; Tech Freedom Comments at 5; Conterra Broadband Services and Uniti Fiber Comments at 19-20.

¹¹ Verizon states that the fees present carriers with a harsh choice: “pay excessive rates (thus reducing the number of facilities the carrier can deploy), delay deployment while attempting to negotiate a fair rate, or abandon plans to locate small facilities in the jurisdiction altogether.” Comments at 9.

at least 29 are imposing up-front fees of \$5,000 or more, and 19 are requiring annual fees of that magnitude. Thirty-one jurisdictions are imposing one-time fees of between \$2,000 and \$5,000, and 43 demand annual fees in that range. Most annual fees include annual escalators of three percent or more. And in many jurisdictions there are even more annual or one-time fees on top. When multiplied by the large number of facilities needed to provide robust and reliable service to these jurisdictions, Mobilitie is facing substantial initial outlays plus outlays of hundreds of thousands if not millions of dollars over time. And those fees are over and above the substantial costs of designing, procuring and installing the facilities.

The record also shows that some localities charge fees for wireless facilities that are much higher than the fees they charged other ROW occupants, underscoring that ROW fees to wireless providers are discriminatory as well as untethered to localities' costs.¹² As T-Mobile notes, "Many localities request fees that unlawfully discriminate against wireless technology, resulting in the impairment of new or improved service."¹³

The record also demonstrates another type of excessive and discriminatory charge: revenues-based fees, such as a certain percentage of a provider's gross revenues. Such fees should be found to be *per se* unlawful because they do not relate at all to a jurisdiction's costs or to the extent that a provider actually deploys facilities in ROWs, and thus cannot be

¹² Verizon Comments at 8-10, Appendix; Conterra Broadband Services and Uniti Fiber Comments at 8; 21-22 ("it is common to encounter schemes requiring that CFPs pay double what incumbents pay for the same access to right-of-way"); Crown Castle Comments at 14 ("Many other jurisdictions discriminate against right-of-way small cell installations while permitting infrastructure for other utilities in the same zones"); WISPA Comments at 7-8.

¹³ T-Mobile Comments at 10.

“compensation” permitted by the Act. As T-Mobile states, revenues-based fees “are clearly unrelated to application review and are solely employed to generate revenue.”¹⁴

The problem of excessive fees is growing worse. Since Mobilitie filed its Petition, it has faced requests from some localities to pay far more than those same localities had initially demanded. The reason for steadily increasing fees is obvious: localities realize that the demand for ROW access to build and install infrastructure is rapidly growing, and are capitalizing on that demand by insisting on ever-higher fees. For example:

- A California city initially proposed a \$1,000 annual fee per site. The city later changed its own proposed agreement to hike fees to \$10,800 – more than ten times higher. It explained that “the amount has been revised to reflect market rates for annual rents received in other cities in California.”
- A city in New York quadrupled its per-site attachment fee it originally requested from Mobilitie from \$500 to \$2,000 – even though it had executed agreements with other providers at the \$500 per attachment rate.
- A Nevada city initially proposed a fee of \$1,200 but then changed its own proposal to double the fee to \$2,400.
- A Georgia city initially granted permits with a one-time fee of \$2000 per pole (in addition to separate application, ROW access fees and permits fees), but has now proposed an ordinance which would impose fees from \$2,800 to \$17,000, depending on the type of attachment and whether a new pole is involved.

Given this record, the Commission has an ample factual basis to curb ROW fees to prevent them from denying the public access to advanced and ubiquitous services.

III. GRANTING MOBILITIE’S PETITION IS CONSISTENT WITH THE LANGUAGE AND PURPOSE OF SECTION 253.

Commenters demonstrate that the Commission possesses ample statutory authority to issue a declaratory ruling to address ROW fees. The record shows that this ruling will be firmly

¹⁴ *Id.* at 13.

grounded in the Commission’s “statutory mandate to facilitate the deployment of network facilities needed to deliver more robust wireless services to consumer throughout the United States” and will fulfill its “responsibility to ensure that this deployment of network facilities does not become subject to delay caused by unnecessarily time-consuming and costly siting review processes that may be in conflict with the Communications Act.”¹⁵

Commenters support each of the three rulings Mobilitie seeks. They show why the Commission should declare that “fair and reasonable compensation” means payment that compensates a locality for its costs, and why that ruling will provide consistency and certainty to providers and localities and speed siting because it will end disputes over what fees are lawful.¹⁶ Similarly they explain why the Commission should rule that, whatever those “reasonable costs” are, a locality may not charge a wireless provider more than it charged other providers, because doing so would violate Section 253’s admonition that fees must be “competitively neutral and non-discriminatory.”¹⁷ Finally, they support Mobilitie’s request that the Commission declare that Section 253’s phrase “publicly disclosed” means that localities must be transparent and disclose the fees they charged other providers.¹⁸ As Sprint observes, “[O]ther entities must have access to records or contracts showing the compensation paid by other telecommunications providers, utilities and right of way users to ensure that the rates and terms offered are ‘competitively neutral and nondiscriminatory.’”¹⁹

¹⁵ Public Notice at 2.

¹⁶ AT&T Comments at 20-21; CTIA Comments at 28-32; T-Mobile Comments at 13.

¹⁷ CTIA Comments at 32; Sprint Comments at 35; T-Mobile Comments at 14.

¹⁸ Verizon Comments at 14; T-Mobile Comments at 14.

¹⁹ Sprint Comments at 35.

IV. ARGUMENTS AGAINST GRANTING MOBILITIE'S PETITION ARE MERITLESS.

Localities opposing the declaratory ruling rely on arguments that are factually incorrect, or are based on the legally erroneous claim that they have a unilateral right to set whatever fees they want, unrestricted by federal law.

Some localities state that their own ROW fees are reasonable, and some are cooperative and negotiate reasonable fees. However, the record reveals a vast disparity in the amounts and types of fees and in the frequency that fees are imposed. That disparity highlights those localities that impose ROW fees far in excess of what others charge, supports the finding that those fees are not “fair and reasonable” under Section 253(c), and underscores why Commission action is needed to interpret the Act to prohibit these high “outlier” fees. The fact that some jurisdictions comfortably charge little or nothing for small cell deployment in ROWs underscores why high fees are neither reasonable nor justified.

The argument that the Commission is being asked to engage in rate-setting is also incorrect.²⁰ Providers recognize that costs will not be the same across all communities.²¹ But each community's charges must be linked to its own reasonable costs – put simply, it should not be able to profit from the public's demand for wireless services. Requiring communities to limit fees to their costs achieves Congress' purpose to curb excessive ROW fees while enabling localities to be fully compensated for their expenses.

²⁰ Virginia Department of Transportation Comments at 11.

²¹ *See, e.g.*, Verizon Comments at 14.

The argument that localities are merely seeking “market”-based fees is also invalid.²² It is not based on any provision in the Act, nor is it factually correct. There is of course no “market” for access to local streets, because localities have control over and regulate all construction. There is only one “supplier” to deal with multiple “buyers.”²³ This is not a market – instead it is a monopoly in which regulatory constraints are essential to police against monopoly rents.²⁴

Several localities assert they have “proprietary” rights over ROWs which entitle them to set fees without limit, but again, this argument ignores Section 253’s language and purpose. To ensure that wireless and other services could be deployed to serve the public, Congress enacted Section 253 and other provisions of the Act, and Section 253 places express limits on “local legal requirements,” which clearly encompass requirements that fees be paid as a condition to constructing facilities. Moreover, as commenters explain, localities do not have a proprietary right over ROWs and facilities in the ROWs, as distinct from rights they may have as an owner of private property. ROWs serve a public purpose, not a private one. Localities manage them through exercising their regulatory powers through laws and regulations, and it is precisely those “legal requirements” that Section 253 constrains to preclude localities from impeding telecommunications services.²⁵ Telephone and electric grids could not have been developed

²² See, e.g., Newport Beach Comments at 1; Oakland County Comments at 9; San Antonio, TX Comments at 27-28.

²³ Verizon Comments at 15 (explaining “[i]n many other cases, market forces are sufficient to ensure reasonable rates. But those competitive options do not exist for access to rights-of-way.”).

²⁴ AT&T Comments at 18; ExteNet Comments at 41; Sprint Comments at 33; Tech Freedom Comments at 5; WIA Comments at 69; Conterra Broadband Services and Uniti Fiber Comments at 7; NTCA Comments at 3-4.

²⁵ CCA Comments at 26; CTIA Comments at 43-46; T-Mobile Comments at 30.

across this country without extensive use of ROWs. Those networks were rapidly deployed without imposing “market” fees in order to deploy services that would benefit the public, and thus benefit localities themselves. Wireless services are no different.²⁶

Localities that assert they may unilaterally set fees do not separately defend *discriminatory* fee-setting, in which they charge higher fees to wireless providers than they had charged other ROW users. Section 253(c) does not require that different types of access must be priced the same, but the record reveals that some providers are forced to pay fees that were not imposed on utilities that installed their own wireless equipment in ROWs.²⁷ The Commission should confirm that Section 253 prohibits that and other forms of discrimination.

Nor do localities object to Mobilitie’s request that the FCC interpret Section 253(c) to require localities to be transparent in their ROW fee requirements by disclosing the fees they have charged other ROW occupants. The Commission should grant this request as well. Disclosure of fees will bring the benefits of transparency to the currently opaque fee-setting process. It will enable providers to confirm that they are not being disadvantaged against others who have accessed ROWs.

Even though not related to the Petition’s request for declaratory ruling on ROW fees, several parties criticize Mobilitie for requesting to install new poles to support wireless facilities in locations that they believe are inappropriate, or that would exceed the height of nearby

²⁶ See Gardner F. Gillespie, Rights-of-Way Redux: Municipal Fees on Telecommunications Companies and Cable Operators, 107 Dick L. Rev. 3029, 3215 (“Use of the streets for these purposes is not only consistent with the public purpose for which the streets were dedicated but benefits the municipality.”).

²⁷ T-Mobile Comments at 7 (“Eighty percent of jurisdictions in T-Mobile’s experience treat DAS and small cell deployments on poles in ROWs differently than they treat similar installations by landline, cable, or electric utilities.”); see also Crown Castle Comments at 14.

municipal or utility poles.²⁸ Localities may review specific locations for effects on ROWs, traffic safety, or other considerations, and infrastructure providers seek to accommodate local concerns. Taller poles have advantages in providing more extensive coverage and can be spaced further apart, minimizing the number of new facilities. Nonetheless, given localities' concerns with taller poles, the company is committed to working with municipalities to develop appropriate locations consistent with surrounding structures and streetscapes.

Mobilitie's process and compliance efforts are designed to ensure that it identifies and fulfills every local requirement, and Mobilitie strives for compliance in meeting local regulations. At the kickoff meeting with the jurisdiction, Mobilitie introduces the deployment plan and supplies the proposed locations for antennas to provide optimal coverage. This meeting enables the company to receive feedback on local procedures and sensitivities. It then continues to work closely with the locality to address concerns regarding the design, location and height of any proposed facility in the community. In a few instances Mobilitie has missed a local notification or other requirement for pole installations.²⁹ Mobilitie took corrective action as soon as it identified any issue. The company regrets any misunderstanding of prerequisites for installations and has taken steps to prevent any future issues.

While Mobilitie makes every effort to ensure that it follows local procedures, there is often room for differing interpretations as to how its deployment of new technology fits within the city's processes, which are generally designed for different, older technology. Some

²⁸ *E.g.*, National League of Cities Comments at 14 (Mobilitie proposed 123-foot pole when nearby poles were 45-60 feet high); Smart Cities Siting Coalition Comments at 20-21 (Mobilitie proposed a new pole in Laurel, MD historic district); Georgia Municipal Ass'n Comments at 3; Texas Municipal League Comments at 20.

²⁹ *E.g.*, Smart Cities Siting Coalition Comments at 18, 23; Cityscape Consultants at 3 (Mobilitie installed poles prior to obtaining approvals). Smart Cities also claims Mobilitie filed applications through several subsidiaries that did not hold state licenses to do business. While Mobilitie disputes this claim, it is clearly not pertinent to this proceeding, which asks the Commission to interpret federal law.

commenters label these situations with inflammatory terms, but these situations usually trace back to reasonable differing views on how new technology should be deployed using anachronistic regulatory structures. Mobilitie seeks to partner with cities to find the best way through these processes while pressing its fundamental view that small cell deployment in the ROW cannot be adequately addressed by the traditional regulatory regime. Issues can arise from ambiguity in the process, changing requirements from the city, and providers' efforts to deploy efficiently and speedily. It is inevitable that policies will be adjusted to meet the high demand for small cells and its particular technical needs. Mobilitie is committed to working with jurisdictions to adjust those policies. Jurisdictions should also recognize that their prior policies governing macrosites are ill-suited for the new small cell technologies and networks to meet the nation's rapidly expanding need for wireless infrastructure.

V. CONCLUSION

For the above reasons and those set forth in the comments, the Commission should take prompt and comprehensive action to lower the high fees and other barriers that are impeding wireless broadband from delivering its many benefits to the American public.

Respectfully submitted,

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